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In the Supreme Court of the United States

OCTOBER TERM, 1980

CLAUDE WARDLE, SR.,

Petitioner,

vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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I. Question Presented for Review

Petitioner sought review under 29 U.S.C. § 1132(a)(1)-(B) in the United States District Court for the Southern District of Indiana of the decision of the trustees of Respondent which denied Petitioner's request for pension benefits. After filing his complaint, Petitioner requested a jury trial. Respondent moved to have the jury request stricken, and this motion was granted. On appeal to the United States Court of Appeals for the Seventh Circuit, that court concluded that Petitioner was not entitled to a jury in this action. Petitioner now asks this Court to review the decision that Petitioner is not entitled to a jury in an action brought under 29 U.S.C. § 1132(a)(1)(B).

II. Parties Concerned

The caption of this case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit.

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In the Supreme Court of the United States

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V. Citations of Opinions Below

Wardle v. *Central States, Southeast and Southwest Areas Pension Fund,* No. 79-2295, slip op. (7th Cir. August 14, 1980).

Wardle v. *Central States, Southeast and Southwest Areas Pension Fund,* No. 77-149-C (S.D. Ind., Apr. 23, 1979) (order granting motion to strike plaintiff's jury request), *reported in* 239 BNA Pension Reporter D-1.

VI. Jurisdictional Statement

Jurisdiction for Petitioner's action under 29 U.S.C. § 1132(a)(1)(B) filed in the United States District Court for the Southern District of Indiana was provided by 29 U.S.C. § 1132(e)(1). Jurisdiction was present in the court of appeals by virtue of 28 U.S.C. § 1291 which grants to that court jurisdiction for consideration of appeals of all final decisions of the district courts of the United States.

On August 14, 1980, the United States Court of Appeals for the Seventh Circuit entered judgment affirming the decision of Judge James E. Noland of the United States District Court for the Southern District of Indiana striking Petitioner's request for a jury trial. This petition for review on certiorari is being submitted to this Court pursuant to 28 U.S.C. § 1254(1).

VII. Constitutional Provisions, Statutes and Rules Involved

The Seventh Amendment to the United States Constitution reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. § 1132 reads:

Civil Enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

* * *

(e)(1) Except for actions under subsection (a)(1)-(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) In any action under this subchapter by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fees and costs of action to either party.

Indiana Code (1971) 18-1-11-3 reads in pertinent part:

Disciplining firemen and policemen—Appeals—

(b) Any member of such fire or police force who is dismissed from such force, as aforesaid, or is suspended therefrom for any period in excess of ten [10] days or reduced in grade shall have the right to appeal to the circuit court or superior court of the county in which such city is located, from such decision of dismissal or suspension or reduction in grade by said board, but shall not have the right of appeal from any other decision. Such appeal shall be taken by such party filing in such court; within thirty [30] days after the date such decision is rendered, a bond as herein required and a verified complaint stating in concise manner the general nature of the charges against him or her, the decision of the board thereon, and a demand for the relief asserted by plaintiff. Such city shall be named as the sole defendant and the plaintiff shall cause summons to issue as in other cases against such city. The board of public safety or the board of metropolitan police commissioners, or the

members thereof, shall not be made parties defendant to any such complaint, but shall be bound by such service upon the city and the judgment rendered by the court. No pleadings shall be required by such city to such complaint, but the allegations thereof shall be deemed to be denied. Such city may file a motion to dismiss the appeal for failure to perfect the same within the time and in the manner required by this section. If more than one [1] person was included in the same charges and in the same decision of dismissal by said board, then any one or more such persons may join as plaintiffs in the same complaint, but only such persons as appeal from any such decision shall be affected thereby, and as to all other persons not so appealing the decision of the board shall be final and conclusive. At the time of filing any such complaint, the plaintiff or plaintiffs shall file a bond, the conditions of which shall be that such appeal will be prosecuted to a final determination and that the plaintiff, or plaintiffs, will pay all costs adjudged against the same. Such bond shall be subject to approval as such bonds for costs are approved in other cases. The decision appealed from shall not be stayed or affected pending the final determination of such appeal, but shall remain in full force and effect until and unless modified or reversed by the final judgment of the court.

(c) Any such decision of the board shall be deemed prima facie correct and the burden of proof shall be on the party appealing. All such appeals shall be tried by the court unless written request for jury be made not less than five [5] days before the date set for said hearing, and shall be heard de novo upon the issues raised by the charges upon which the decision of the board was made, which charges shall be deemed to be denied by the accused person. Within ten [10] days after the service of summons said board shall file in said court a full, true and complete transcript of all papers, entries and other parts of the record relating to such particular case, and inspection thereof by the person affected, or by his or her agent, shall be per-

mitted by the board before such appeal is filed, where so requested. Each party may produce such evidence as it may desire, relevant to the issues, and the court upon such appeal shall review the record and decision of such board.

• • •

Federal Rule of Civil Procedure 38(a) reads:

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

VIII. Statement of the Case

A Teamsters' pension fund (Respondent) denied a truck owner-operator's (Petitioner's) application for retirement benefits because he allegedly lacked employee status in the industry for twenty continuous years. Petitioner challenged the denial of Respondent's trustees by filing suit in district court on September 14, 1979, under § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. On November 14, 1977, Petitioner filed his request for a jury trial.

In the course of the litigation, Respondent filed on January 10, 1980, its motion to have Petitioner's jury request stricken. After both sides briefed the issue of jury trial in an ERISA action, District Judge Noland granted on April 23, 1979, Respondent's motion and struck Petitioner's request for trial by jury.

Following Judge Noland's final judgment in the case, Petitioner timely appealed that judgment to the United States Court of Appeals for the Seventh Circuit. In that court, the following issue, *inter alia,* was raised on appeal: "Striking of [Petitioner's] request for trial by jury constitutes reversible error."

Abandoning prior district court decisions from other circuits, the Court of Appeals for the Seventh Circuit ruled that Petitioner was not entitled to a jury in this action. That court's judgment is based on the conclusions that (1) the legislative history of ERISA does not imply congressional intent to allow a jury trial in a 29 U.S.C. § 1132(a)(1)(B) claim; (2) Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants be equitable; and (3) Petitioner's claim was equitable in nature, precluding any consideration of the Seventh Amendment.

IX. Argument

The record below shows that Respondent averages denying approximately 100 of the 1,000 pension claims it receives each month. As is shown herein, the court of appeals decision means those of that yearly 1,200 who live in Wisconsin, Illniois or Indiana will be denied a jury in any federal action which they might file under ERISA while their counterparts of that same 1,200 who have the good fortune of residing in Vermont, New York, Ohio, Kentucky, Tennessee or Michigan will, in all probability, be permitted to present their cases to a jury. This state of affairs cannot possibly lead to the uniform national labor policy regarding federal regulation of pension plans espoused by ERISA. By the same token, this condition is certainly perplexing to pension applicants of Wisconsin, Illinois and Indiana seeking judicial recourse after being denied benefits by Respondent who see their similarly situated neighbors across the Michigan border receiving dissimilar treatment in identical actions filed in our federal district courts. The Seventh Circuit was the first court of appeals to consider this issue, but the reported decisions of the district courts are evenly divided on the question. In addition to the district court in this case, the courts in *Genesta* v. *San Diego County Laborers' Pension Plan,* 87 Lab. Cas. ¶ 11702, at 22827 (S.D. Cal. 1979) and *Porter* v. *Central States Pension Fund,* 98 L.R.R.M. 3210 (N.D. Iowa 1978) held that jury trial was not required in an action under § 502. *Pollock* v. *Castrovinci,* 476 F. Supp. 606 (S.D. N.Y. 1979), *Bouton* v. *Central States, Southeast and Southwest Areas Pension Fund,* No. CIV-2-78-189 (E.D. Tenn., Dec. 20, 1978) (order denying motion to strike plaintiff's jury demand—set forth in Appendix), and *Stamps* v.

Michigan Teamsters Joint Council No. 43, 431 F. Supp. 745 (E.D. Mich. 1977) held that jury trial was required. Surely the importance of the jury trial issue in the administration and enforcement of ERISA and the diversity of views in the lower courts is worthy of this Court's scrutiny. *Curtis* v. *Loether,* 415 U.S. 189, 191 (1974).

The district court's striking of Petitioner's jury request —and the court of appeals' affirmation of the district court's action—completely ignored the Seventh Amendment and the thrust of this Court's opinion in *Curtis* v. *Loether,* 415 U.S. 189 (1974). *See also, Pernell* v. *Southall Realty,* 416 U.S. 363 (1974). *Loether* was an action under the fair housing provisions of the Civil Rights Act of 1968 (42 U.S.C. § 3612). The district court there held that the plaintiff's jury demand was neither authorized by Title VII nor required by the Seventh Amendment. The Court of Appeals for the Seventh Circuit reversed on the jury trial issue and was upheld by this Court which said via Mr. Justice Marshall in 415 U.S. 189, 192-93 (1974):

> The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:
>
> > "The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence . . . . By *common law* [the Framers of the Amendment] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which the *legal* rights were to be ascertained and determined, in contradistinction to

> those where equitable rights alone were recognized, and equitable remedies were administered . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights." Parsons v. Bedford, 3 Pet. 433, 446-447, 7 L. Ed. 732 (1830) (emphasis in original).

Accordingly, unless this suit falls within the established concepts of equity or admiralty, it is a legal action and triable to a jury. As surely as this suit is not of admiralty jurisdiction or of maritime jurisprudence, nothing contained in ERISA or in that act's legislative history indicates that Congress intended this breach of contract suit brought by a third party beneficiary to be equitable in nature. 29 U.S.C. § 1132(a) utilizes the phrase "civil action," which is in keeping with the abolition of the dichotomy between legal and equitable actions.

Petitioner implored the district court and the court of appeals to follow the decision of Judge Joiner of the Eastern District of Michigan (6th Circuit) set forth in his opinion in *Stamps* v. *Michigan Teamsters Joint Council No. 43,* 431 F. Supp. 745 (E.D. Mich. 1977), which reads in part at 746:

> An employee who sues for money damages arising from a breach of the collective bargaining agreement is entitled to a jury trial upon request, *Lucas* v. *Philco-Ford Corporation,* 380 F. Supp. 139 (E.D. Pa. 1960); *United Electrical R. & M. Workers* v. *Oliver Corp.,* 205 F.2d 376 (8th Circ. 1953), because an action under Section 301 [of the Labor-Management Relations Act] is essentially a contract action for damages. Absent statutory language or policy to the contrary, the plaintiff is entitled to a jury trial. (Footnote omitted.)

Petitioner, like William Stamps, filed suit in federal district court alleging that Respondent breached a contract, the existence of which was stipulated to, in seeking to enforce his rights as a third party beneficiary of that contract. In reviewing *Stamps,* the court of appeals states in *Wardle* at 15:

> The court in *Stamps* reasoned primarily that, even though ERISA does not specifically address the jury right issue, the statutory scheme itself and its legislative history compelled the conclusion that § 502(a)(1) provides a plaintiff suing for pension benefits due and owing with a right to a jury. Because the Constitution entitles a party to a jury for all legal claims, the statutory issue to the *Stamps* court was whether Congress, in § 502(a)(1)(B), had created a legal or equitable claim. The subsection itself is silent on that issue, but, according to that court, if claims under § 502(a)(1)(B) were construed as equitable, that subsection would become mere surplusage in light of § 502(a)(3), which expressly provides participants and beneficiaries with a right to bring civil actions for various kinds of equitable relief. The court thus concluded that, to avoid becoming superfluous, § 502(a)(1)(B) must be construed as creating a legal right, which entitled Stamps to a jury. The court found further support for its conclusion in the Joint Explanatory Statement of the Committee of Conference, which reads in part:
>
> > All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947.
>
> H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5107. The court construed this statement to indicate, in light of its independent conclusion that Stamps was entitled to a jury under § 301 of the Labor-Man-

> agement Relations Act on the part of his claim for pre-ERISA benefits, that a jury should also be provided for claims under § 502(a)(1)(B) of ERISA. (Footnote omitted.)

The court of appeals' decision in *Wardle* at 16 admits in footnote 18 that the analysis of the *Stamps* court has been approved by District Judge Goettel in *Pollock* v. *Castrovinci,* 476 F. Supp. 606, 608-09 (S.D.N.Y. 1979) (2d Circuit). Nevertheless, the court of appeals disregarded the *Stamps* analysis, finding that sub-subsection (1)(B) is not mere surplusage in light of sub-subsection (3) "because Congress granted State courts concurrent jurisdiction only over § 502(a)(1)(B) claims. 29 U.S.C. § 1132(e)(1)." *Wardle* at 16. Thus it was reasoned that the specific types of claims enumerated in sub-subsection (1)(B) would still have to be separated in some manner from general equitable actions under sub-subsection (3).

Resort by the court of appeals to sub-subsection (3) is improper when it is realized that subsection (a) of § 502 is subdivided into sub-subsections (1), (2) and (3) *not* to show the *types of relief* available, but rather to designate *what persons* may bring civil actions to obtain the relief permitted in the numbered sub-subsections. That is to say, sub-subsection (1) allows a civil action to be brought by a *participant* or *beneficiary.* Sub-subsection (2) allows a civil action to be brought by the *Secretary of Labor* or a *fiduciary,* in addition to a participant or beneficiary. Sub-subsection (3) permits a civil action to be brought by a *fiduciary* as well as the persons permitted by sub-subsection (1) to bring a civil action—namely, a participant or beneficiary. Within each of the numbered sub-subsections, the types of relief available to a person permitted to bring a civil action therein is further specified either (1) in the

form of sub-sub-subsections (*e.g.*, (a) and (b) of sub-subsection (1)) or (2) expressly in the numbered sub-subsection (*e.g.*, relief under section 1109 of Title 29 as stated in sub-subsection (2)).

It may be that the analyses of the *Stamps* court and the *Wardle* courts are both wrong. Certainly the same persons (*i.e.* participants or beneficiaries) are allowed by all three numbered sub-subsections of § 502(a) to bring a civil action. However, no relief under sub-subsections (1) or (3) is available to the Secretary of Labor and no sub-subsection (1) relief is available to a fiduciary.

The Seventh Circuit is wrong when it suggests that the specific types of claims enumerated in (1)(B) still have to be separated in some manner from general equitable actions under (3). A plain and logical reading of (1)(B) leads to a belief that the distinction is already clear as written: The first clause thereof allows a civil action for money damages to recover benefits due; the second clause thereof allows a civil action for specific performance of the terms of the plan; and the third clause thereof allows a civil action seeking a declaratory judgment.

Consequently, it may very well be that two types of *equitable* relief are available under § 502(a)(1)(B), namely, specific performance and declaratory judgments. Nevertheless, *legal* relief is *also* available in the form of money damages to recover benefits—an action supported by Restatement (Second) Trusts § 198 (1959).

A closer look at the legislative history of ERISA reveals that this interpretation may be correct. On April 18, 1973, the Senate Committee on Labor and Public Welfare, in S. Rep. No. 127, 93d Cong., 1st Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4838, 4871, states: "The intent of the Committee is to provide *the full range of legal and*

equitable remedies available in *both* State and Federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under State law for recovery of benefits due participants." (Emphasis added.) This same language was repeated by the House Committee on Education and Labor on October 2, 1973, in H.R. No. 533, 93d Cong., 2d Sess., *reprinted* in [1974] U.S. Code Cong. & Ad. News 4639, 4655. Similarly, on August 21, 1973, the Senate Committee on Finance wrote in S. Report No. 383, 93d Cong., 1st Sess., *reprinted* in [1973] U.S. Cong. & Ad. News 4890, 4988: "Under the bill, the Secretary of Labor *and participants and beneficiaries of a plan may bring civil actions for any appropriate legal or equitable relief* to redress or restrain a violation of fiduciary duties." (Emphasis added.) Likewise, in debate before the Committee of the Whole House on the State of the Union, on its substitute for H.R. 2, it was stated on February 26, 1974: "The Secretary of Labor would have authority to investigate any plan and would have authority to bring any *legal* action to enjoin any act or practice which appears to him to violate the law. Participants and beneficiaries would also have the right to institute *such* proceedings." (Emphases added.) 120 Cong. Rec. 4281 (1974). Where both legal and equitable relief are sought, a jury request must be honored. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959).

Thus, it is clear that while § 502(a)(1)(B) allows equitable relief, it also permits the filing of a civil action seeking legal relief. How is it to be determined whether or not Petitioner's claim is legal or equitable? Following the *Stamps* court's analysis, the Joint Explanatory Statement of the Committee of Conference (set out above) should be followed and ERISA actions are to be regarded as arising under the laws of the United States in similar fashion to

those brought under Section 301 of the LMRA of 1947. The *Stamps* opinion reads at 746:

> An employee who sues for money damages arising from a breach of the collective bargaining agreement is entitled to a jury trial upon request, *Lucas* v. *Philco-Ford Corporation,* 380 F.Supp. 139 (E.D. Pa. 1974); see *Allen* v. *United Mine Workers of America,* 319 F. 2d 594 (6th Cir. 1963); *Lewis* v. *Kepple,* 185 F.Supp. 884 (W.D. Pa. 1960); *United Electrical R. & M. Workers* v. *Oliver Corp.,* 205 F.2d 376 (8th Cir. 1953), because an action under section 301 is essentially a contract action for damages. Absent statutory language or policy to the contrary, the plaintiff is entitled to a jury trial. (Footnote omitted.)

Judge Joiner of Michigan, Judge Goettel of New York and Magistrate Murrian of Tennessee (*Bouton* v. *Central States, Southeast and Southwest Areas Pension Fund,* No. CIV-2-78-189 (E.D. Tenn., Dec. 20, 1978—order denying motion to strike plaintiff's jury demand)) all reasoned, ultimately, that this statutory silence leads to a jury trial as a matter of right.

On the other hand, three judges for the Seventh Circuit inferred more from this congressional silence and went one step further by concluding that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants be equitable. In support of this conclusion, the Seventh Circuit cites *Davis* v. *Huge,* 91 L.R.R.M. 2234 (E.D. Ky. 1975); *Genesta* v. *San Diego County Laborers' Pension Plan,* 87 Lab. Cas. ¶ 11702, at 22827 (S.D. Cal. 1979); *Porter* v. *Central States Pension Fund,* 98 L.R.R.M. 3210 (N.D. Iowa 1978); and *Sichko* v. *Lewis,* 191 F. Supp. 68 (W.D. Pa. 1960).

As noted in *Bouton,* both *Davis* and *Porter* are distinguishable from the present case. Both of those cases were

decided without reference to either Section 301 of the LMRA or ERISA. This same distinction was noted by Judge Joiner. *Stamps* at 746.

Sichko again was decided without reference either to LMRA or ERISA. *Sichko* expressly acknowledges, as does the Seventh Circuit, the applicability of §§ 197 and 198 of Restatement (Second) of Trusts (1959). *Sichko* at 69 and *Wardle* at 17 recognize that a participant is entitled to a jury trial if it should appear that the trustee of the pension fund is under a duty to pay the money immediately and unconditionally to the participant. As recognized in *Bouton,* the combination of both legal and equitable claims cannot defeat a plaintiff's right to jury trial on the legal claim, including all issues common on both claims. *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. at 508.

Petitioner would urge the Court to carefully consider the dictum of the *Sichko* court which implies that the state of the record *at the time of filing* a motion to strike a jury demand will determine the ruling on said motion. This procedure, in petitioner's opinion, advocates a procedure which is repugnant to one of the stated purposes of ERISA, namely, to provide a uniform national labor policy regarding pension plan enforcement. Similarly, if the court of appeals is correct in that a body of federal common law should be developed for claims arising under § 502 of ERISA, this advocated procedure again frustrates a uniform federal view on the question of jury trials in these actions.

Petitioner's complaint, as filed, can fairly be interpreted as seeking the same relief requested of Respondent in *Bouton.* That is, Petitioner requested an immediate lump sum payment of all pension benefits due him up to the time that a final judgment is entered in the case, and a

clarification or judgment that he is entitled to pension benefits in the future according to the terms of the plan. Certainly this complaint sought money from the date of application to the date of judgment which Respondent's trustees were under a duty to pay unconditionally and immediately to Petitioner. Under Restatement (Second) Trusts § 198 (1959) this part of the complaint sought a legal remedy. Regardless of whether or not equitable remedies were also sought under the complaint, *Beacon* bespeaks this Court's belief that Petitioner was entitled to a jury trial herein.

The *Genesta* opinion criticizes *Stamps* because it did not focus on the applicable standard of review in such a case as this. Since when does the standard of review to be employed by the trier of fact determine whether an action is legal or equitable in nature?

The issue before the district court was whether or not respondent incorrectly determined that Petitioner was not an employee in the teamster industry for the 20 continuous years required to receive pension benefits under the plan and, because of that incorrect determination, whether Respondent breached a contract for which Petitioner was entitled to recover his damages. The action is clearly one for breach of a third-party beneficiary contract. While the burden of proving the trustees' arbitrary and capricious action may be upon Petitioner, that in no way casts this litigation into the realm of an equitable action. Breach of contract actions are uniformly recognized as actions at law where the relief requested is an award of money damages. Compensatory (actual) and punitive damages, as sought in Petitioner's complaint, are the traditional forms of relief offered in courts of law. *Curtis* v. *Loether*, 415 U.S. at 196.

Thus, the *Genesta* opinion is in error when it looks to the applicable standard of review in determining whether

or not a cause of action is legal. Accordingly, the *Genesta* court's reliance on *Rehmar* v. *Smith,* 555 F.2d 1362 (9th Cir. 1976) is misplaced. *Rehmar* should not have been blindly followed.

As noted above, the belief held by the court of appeals—that the granting of exclusive jurisdiction to federal courts over some claims under § 502 while granting concurrent jurisdiction to other claims thereunder leads conclusively to a finding that these claims are equitable—is incorrect. As shown by the above references to the legislative history, the most reasonable interpretation is *not* that Congress intended to provide general federal jurisdiction over equitable suits that had traditionally been brought in state courts. Rather, the full range of legal and equitable remedies was to be provided to participants and beneficiaries in *both state and federal forums.*

For the Seventh Circuit to flatly state at page 17 of *Wardle* that the application of the arbitrary and capricious standard has traditionally been done by judges does not make that statement true. The Seventh Circuit cites no authority for this broad statement. As one example to the contrary with which Petitioner's counsel is familiar, Indiana Code (1971) 18-1-11-3 provides for the intervention of a jury upon request when a plaintiff aggrieved by an administrative order seeks judicial review of that order. The Indiana Court of Appeals has held that the standard of review to be employed in such judicial review is the same as that with which we are now concerned. That court ruled that there is no trial *de novo. City of Indianapolis* v. *Ingram,* ..... Ind.App. ....., 377 N.E.2d 877 (1978). Time limitations have restricted Petitioner's counsel's research as to the other similar instances which are believed to be citable to this Court.

The court of appeals erroneously believes at 17 of *Wardle* that "the limited scope of judicial review bespeaks a legislative scheme granting initial discretionary decision-making to bodies other than federal courts, with which jury trials have proved incompatible." This is so because the court of appeals has misread *Curtis* v. *Loether* at 194-95. There this Court merely indicated that Petitioner is not permitted jury intervention in administrative hearings. Petitioner knows this. However, that does not preclude a jury during judicial review.

Federal juries have been called upon for years to decide countless questions in innumerable cases. A question of arbitrary and capricious action is no different than questions of negligence, contributory negligence, assumption of risk, preponderance of the evidence, guilty beyond a reasonable doubt, willful and wanton misconduct, etc.

The right to a jury trial in an action under the Age Discrimination in Employment Act (ADEA 29 U.S.C. § 621) was decided by the Court in *Lorillard* v. *Pons,* 434 U.S. 575 (1978). Pons sought reinstatement, lost wages, liquidated damages, attorney's fees and costs. The ADEA, like ERISA, contains no provision expressly granting a right to jury trial. In *Pons,* the Court based its opinion strictly upon the language of the statute being considered rather than on the Constitutional question. The Court found that the statute invested an aggrieved person thereunder with the right to seek either equitable or legal relief. This is the same decision reached by Judge Joiner in *Stamps,* namely, that ERISA permits a civil action whereby either legal or equitable relief can be sought. Petitioner recognizes that there is a distinction between the literal language of the enforcement portions of these two statutes, but he submits that there exists a distinction without a

difference when it is realized that both statutes authorize enforcement through civil actions which may be either equitable or legal in nature. There is nothing in the ADEA —nor in ERISA—indicating that Congress intended to abandon the traditional test when determining whether the right to a trial by jury exists. *Pons* reads at 583:

> This inference is buttressed by an examination of the language Congress chose to describe the available remedies under the Act. Section 7(b), 29 U.S.C. Section 626(b) empowers a court to grant "*legal* or equitable relief" and § 7(c), 29 U.S.C. § 626(c) authorizes individuals to bring actions for "*legal* or equitable relief" (emphases added). The word "legal" is a term of art: In cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to jury trial. See *Curtis* v. *Loether,* 415 U.S. 189, 195-196, 94 S.Ct. 1005, 1008-1009, 39 L.Ed.2d 260 (1974). "[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.

The district court and the Seventh Circuit should not have assumed that by using the term "civil action" in § 502 of ERISA Congress was ignorant of the fact that a civil action could be either one at law or in equity. Inasmuch as Congress expressly created an equitable remedy for an aggrieved beneficiary, not for the purpose of recovering benefits, but for the sole purpose of preserving and perpetuating the integrity of the pension fund, it necessarily follows that Congress did *not* intend that a third party beneficiary's action to recover benefits be deemed an equitable action. If Congress had intended to deny such a beneficiary the right to a jury trial, Congress knew how to effect that objective and would certainly have done so as they have done in other federal labor legislation.

In concluding this argument, Petitioner would submit that the jury trial issue in the administration and enforcement of ERISA presents a substantial federal question which may present the Court with a significant Constitutional question. The Seventh Circuit's opinion on the issue ignored opposite conclusions reached by district courts in other circuits. Disparate treatment of similarly situated aggrieved pension applicants to the same pension plan is now being afforded them in our federal trial courts. Petitioner begs the Court to exercise its discretion in issuing a writ of certiorari to the Seventh Circuit so as to review that court's decision (1) on this important question of federal law which has not been, but should be, settled by this Court, and (2) which has decided this federal question in a way in conflict with applicable decisions of this Court.

Respectfully submitted,

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APPENDIX

X. APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-2295

CLAUDE WARDLE, SR.,

Plaintiff-Appellant

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division.

No. TH 77-C-149—James E. Noland, *Judge.*

Argued May 1, 1980—Decided August 14, 1980

Before SWYGERT, PELL, and CUDAHY, *Circuit Judges.*

SWYGERT, *Circuit Judge.* A Teamsters pension fund denied a truck owner-operator's application for retirement benefits because he allegedly lacked employee status in the industry for a number of years. The applicant challenges the denial in this action under § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. On appeal, we affirm the district court's refusal to overturn the fund's denial of pension benefits and its denial of the applicant's motion for a jury trial.

In September 1974 Claude Wardle applied for pension benefits from the Central States, Southeast and Southwest

Areas Pension Fund in anticipation of his retirement at the end of the following February after forty-five years as a truck driver. Wardle had driven for Purcell & O'Haver, which was engaged in the manufacture of lumber, from 1954 through 1961 and for Lovelace Truck Service, a common carrier, starting in 1961.[1] Wardle had withdrawn his Teamsters membership card when he began work for Purcell but had reinstated his membership when he switched to Lovelace. Central States had not received pension contributions on Wardle's behalf during his employment at Purcell, which was not unionized, but had during his stint at Lovelace, although the evidence is conflicting as to whether Wardle or Lovelace had actually paid the contributions. From 1954 through 1972, Wardle had done all his driving in equipment that he owned. In September 1972 he had disposed of his truck tractor and thereafter had driven only trucks owned by Lovelace.

Wardle's application for retirement benefits was to be judged according to the terms of Central States' written Pension Plan, as constituted July 1, 1973. One requirement for eligibility was the completion of "twenty years of continuous service in the industry." Pension Plan, Art. I, Sec. 15.[2] The Plan defined "continuous service in the

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[1] Wardle continued to drive for Lovelace Truck Service and its successor, Commercial Lovelace Motor Freight, Inc., until 1978.

[2] Article III, Section 1 of the Plan, which concerned the payment of benefits, provided that "An employee who has reached the NORMAL RETIREMENT DATE shall be eligible for the retirement benefit provided for by this Pension Plan." (Capitalization in original.) Article I, Section 15 defined Normal Retirement Date for employees who became members of the Plan prior to July 1, 1967, such as Wardle if his contentions are accepted, as the date on which all of four specified requirements are met. The only requirement that Central States has contended Wardle has not met is that of "twenty years of continuous service in the industry."

industry'' to mean years of employment after the applicant's last ''break in service.'' Pension Plan, Art. I, Sec. 14.[3] The definition of continuous service in the industry also specified that any time spent self-employed in the industry was not creditable toward satisfaction of this requirement. The Plan did not expressly define ''self-employed,'' but did define ''employee status.'' One requirement for such status was the following:

> In all instances, the common law test, or the applicable statutory definition of master-servant relationship shall control.

Pension Plan Art. I, Sec. 7(d).

After receipt of Wardle's application for retirement benefits, Central States sought information verifying his claim. It obtained, with Wardle's permission, earnings data from the Social Security Administration, statements from officials at both Purcell and Lovelace, responses to a six-page questionnaire about the details of Wardle's employment arrangements from both company officials and Wardle, and copies of Wardle's lease agreements with Lovelace.

On the basis of most of these documents, Edward Murtha, Administrator of the Pension Benefits Division, wrote Wardle on September 10, 1975, informing him of the denial of his application by the Pension Payment

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[3] A break in service occurred when an employee was not in "covered employment" for five consecutive years between February 1, 1955 and April 1, 1969 or for three consecutive years after April 1, 1969. Pension Plan, Art. I, Sec. 13. Although extremely complex, the definition of covered employment may for present purposes be summarized as "[e]mployment requiring the usual Teamster skills in traditional Teamster industries at the time of such employment." Art. I, Sec. 11-A(1)(C).

Committee of the Trustees. The reason given was that Wardle had been out of "covered employment," as defined by the written pension agreement,[4] from 1954 through August 1972 and therefore had incurred a break in service disqualifying him from receiving pension benefits. More specifically, the letter related, Wardle had not shown that he had had "employee status" while working for Purcell from 1954 to 1961 and for Lovelace from 1961 through August 1972. The letter indicated further that "[s]elf-employment cannot be considered covered employment."[5]

The Committee later reexamined Wardle's application. On March 3, 1976 Regina Sedin, Supervisor in the Pension Processing Department, wrote Wardle informing him that the Committee had decided to "reaffirm their previous decision" and enclosed a copy of the earlier letter from Murtha. Sedin's letter also noted an affidavit of the Lovelace payroll clerk stating that pension contributions had been deducted from Wardle's paycheck from June 1961 through September 1972 and suggested on behalf of the trustees, that Wardle apply for a refund of these contributions.

Wardle then brought this suit in federal court seeking review under 29 U.S.C. § 1132(a)(1)(B) of Central States' denial of his application. The complaint styled itself as one for compensatory damages of $92,400, the amount of benefits that Wardle estimated would accrue during his lifetime, punitive damages of $250,000, reasonable attorney fees and costs, and "all other just and proper relief."

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[4] The letter indicated that the relevant definition was to be found in Article I, Section 11-A of the pension agreement.

[5] The letter also informed Wardle of his right to appeal the decision to the Pension Payment Appeals Committee.

Wardle also filed a jury trial request with the district court. On April 23, 1979 the district court granted Central States' motion to strike Wardle's demand for a jury trial on the ground that this suit under ERISA was equitable in nature. On the same date the court denied Wardle's motion to increase his demand for punitive damages and ruled that punitive damages were not recoverable under ERISA. On September 27, 1979, after the receipt of stipulations, the presentation of evidence, and the hearing of oral argument, the court upheld Central States' decision to deny Wardle any pension benefits.

On appeal Wardle challenges all three rulings of the district court. We consider his contentions that the district court erred in upholding Central States' decision and in denying him a jury. Because we affirm the district court's ruling on both these points, we need not consider its ruling on the punitive damages claim.

I.

Wardle's principal contention on appeal is that Central States' decision to deny him retirement benefits is erroneous as a matter of law. We first discuss the appropriate standard of review in an ERISA action of a decision by pension fund trustees to deny pension benefits; we then apply that standard to the facts at bar.

The parties agree on the standard of review to be applied in this case. In *Reiherzer* v. *Shannon,* 581 F.2d 1266, 1272, (7th Cir. 1978), a case in which Central States was a defendant and in which the 1973 edition of the Plan also applied, we established that a challenge under § 502(a)(1)(B) of ERISA to a denial of pension benefits by a pension fund's trustees was to be overturned by a federal court only if it was "arbitrary and capricious in light of

the language of the Plan." Along with the Fifth and Eighth Circuits, we thus applied the traditional standard of review of the law of trusts used in diversity jurisdiction cases challenging such decisions. *Bayles* v. *Central States Pension Fund,* 602 F.2d 97, 99-100 & n.3 (5th Cir. 1979); *Bueneman* v. *Central States Pension Fund,* 572 F.2d 1208, 1209 & n.3 (8th Cir. 1978); *see also Riley* v. *MEBA Pension Trust,* 570 F.2d 406, 408, 410 (2d Cir. 1977) (same standard of review applies to trustees' plan interpretations in an action seeking relief under § 502(a) generally).[6] The use of this standard of review in federal courts apparently originated in the District of Columbia Circuit, which has phrased the standard as "whether the Trustees have acted arbitrarily, capriciously, or in bad faith; that is, is the decision of the Trustees supported by substantial evidence or have they made an erroneous decision on a question of law." *Danti* v. *Lewis,* 312 F.2d 345, 348 (D.C. Cir. 1962). *See also Rehmar* v. *Smith,* 555 F.2d 1362, 1371 (9th Cir. 1976). A federal court is to focus on the evidence before the trustees at the time of their final decision and is not to hold a *de novo* factual hearing on the question of the applicant's eligibility. *Phillips* v. *Kennedy,* 542 F.2d 52, 54 (8th Cir. 1976). As a general matter a court should not resolve the eligibility question on the basis of evidence never presented to a pension fund's trustees but should remand to the trustees for a new determination. *See id.* at 55 & n.10; *Sturgill* v. *Lewis,* 372 F.2d 400 (D.C. Cir. 1966); *Pickett* v. *UMW Health & Retirement Funds,* 467 F. Supp.

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[6] The Eighth and Ninth Circuits have applied this standard of review in similar cases based on § 301 of the Labor-Management Relations Act. *Maness* v. *Williams,* 513 F.2d 1264, 1265 & n.1 (8th Cir. 1975); *Rehmar* v. *Smith,* 555 F.2d 1362, 1366-67, 1369-71 (9th Cir. 1976).

2 (E.D. Tenn. 1978); *Ruth* v. *Lewis*, 166 F. Supp. 346, 349 (D.D.C. 1958).[7]

The parties agree that the substantive eligibility issue in this case is whether Wardle had employee status while working for Purcell and Lovelace prior to September 1972. The parties also appear to agree that the critical issue in the determination is whether Wardle satisfied Section 7(d) of Article I of the Plan. Since neither party contends that any applicable statutory definition of employee exists, the standard is that of common law master-servant.

We long ago summarized the common law master-servant test to be applied to distinguish between an employee and an independent contractor.

> [T]he employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished, and that it is the right and not the exercise of control which is the determining element. A number of tests were pointed out, such as the right to hire and discharge persons doing the work, the method and determination of the amount of payment to the workmen, whether the person doing the work is engaged in an independent business or enterprise, whether he stands

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[7] Some cases, tried on stipulated or undisputed facts before the district court, have not expressly faced this issue. *See, e.g., Bayles* v. *Central States Pension Fund*, 602 F.2d 97, 98 (5th Cir. 1979); *Reiherzer* v. *Shannon*, 581 F.2d 1266, 1268 (7th Cir. 1978); *Maness* v. *Williams*, 513 F.2d 1264, 1265 (8th Cir. 1975).

Both parties before us appear to agree that we should review Central States' decision only in light of facts before its Committee at the time. Yet additional evidence was presented to the district court on the issue of Wardle's status with Purcell and Lovelace, and both parties argue that this evidence supports their respective contentions on the question of eligibility.

> to make a profit on the work of those working under him, the question of which party furnishes the tools or materials with which the work is done. In addition to the tests there mentioned, consideration must be given to other factors, such as whether the relationship is of a permanent character, the skill required in the particular occupation, and who designates the place where the work is to be performed.

NLRB v. *Phoenix Mutual Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir.), *cert. denied*, 335 U.S. 845 (1948). *See also Restatement (Second) of Agency* § 220 (1958). The belief of the parties has also been thought relevant, although in most cases not determinative. *See id.* § 220(2)(i) & Comment m. Courts have also allowed consideration of how the parties structure their Social Security and income tax relations.[8] Illinois law, which the Plan itself indicates should control questions of construction, *see* Pension Plan, Article VI, is not materially different, although the cases stress the elements of the right to control the details of the work, the right to discharge, which seems to be a re-

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[8] *See Carter* v. *Central States Pension Fund*, No. 77-2078 (D. Kan. Nov. 1, 1978); *Mendise* v. *Central States Pension Plan*, 90 L.R.R.M. 3208, 80 Lab. Cas. ¶ 11887, at 22503 (N.D. Ohio 1975); *Ramsey* v. *Lewis*, 55 Lab. Cas. ¶ 12022, at 19372, 19374-75 (E.D. Tenn. 1966); *Manahan* v. *Daily News-Tribune*, 50 Ill. App. 3d 9, 16, 365 N.E.2d 1045, 1050, 8 Ill. Dec. 659 (1977); *Munts* v. *Fitzsimmons*, 25 Ill. App. 3d 109, 111-12, 323 N.E.2d 153, 155 (1975); *Westlund* v. *Kewanee Pub. Serv. Co.*, 11 Ill. App. 2d 10, 24, 136 N.E.2d 263, 270 (1956); *see also Mueller* v. *Cities Serv. Oil Co.*, 339 F.2d 303, 307 (7th Cir. 1964).

This court has stressed, however, the limited role that Social Security records should play in this determination. *See Reiherzer* v. *Shannon*, 581 F.2d 1266, 1272-73 (7th Cir. 1978).

We also note that the standard for determining whether a person is an employee for Social Security purposes is basically identical to the common-law standard. *See Hoosier Home Improvement Co.* v. *United States*, 350 F.2d 640, 642-43 (7th Cir. 1965).

quirement for finding an employer/employee relationship, and the term of employment. *See Hayes* v. *Morse,* 347 F. Supp. 1081, 1085 (E.D. Mo. 1972), *aff'd,* 474 F.2d 1265 (8th Cir. 1973); *Meyer* v. *Industrial Comm'n,* 347 Ill. 172, 178-79, 179 N.E. 456, 458 (1931).[9] In most instances of decision,

> there is no shorthand formula or magic phrase that can be applied to find an answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles.

NLRB v. *United States Ins. Co.,* 390 U.S. 254, 258 (1968). *See also Henn* v. *Industrial Comm'n,* 3 Ill. 2d 325, 327, 121 N.E.2d 492, 494 (1954); *Darner* v. *Colby,* 375 Ill. 558, 560, 31 N.E.2d 950, 951 (1941); 17 Ill. Law & Prac., *Employment* § 4 (1956).

In this context Wardle's several specific contentions on the substantive aspects of this appeal can be condensed to the following arguments in the alternative: (1) that, on the facts known to Central States at the time of its decision,[10] Wardle was an employee of Purcell and Lovelace as a matter of law, and (2) that the Committee lacked sufficient evidence on which to conclude that Wardle was self-employed.

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[9] Illinois courts have considered Social Security and income tax returns as factors in the decision, *see* note 8 *supra,* as well as the parties' intentions, as expressed in the contract or by their acts. *See Manahan* v. *Daily News-Tribune, supra,* 50 Ill. App. 3d at 14, 365 N.E.2d at 1049; *see also Mueller* v. *Cities Serv. Oil Co., supra* note 8, 339 F.2d at 307.

[10] We consider the Committee's decision of March 3, 1976 after reexamination of Wardle's file to be the relevant one for our purposes. If an earlier denial that is arbitrary and capricious because of insufficient evidence is followed by a denial on reconsideration that is based on additional information that provides an adequate basis for the decision, we surely should not order payment of the

(footnote continued)

Wardle first argues that he was an employee of Purcell as a matter of law because some aspects of his employment relationship indicate an employee status. Wardle was subject to the company's authority with respect to hiring, firing, and discipline. He was treated no differently than employees who were not owner-operators with respect to fringe benefits and working conditions. Purcell determined when Wardle reported to work, the hours he worked, and the routes he took. Wardle could refuse trips only because of illness or poor road conditions. He drove subject to the company's work rules. Wardle worked a minimum of 40 hours a week for Purcell and drove for no one else during that time. Wardle owned no other trucks and had no drivers working under him.

Nevertheless, Central States' decision was not arbitrary or capricious or erroneous as a matte of law because other aspects of Wardle's employment indicate an entrepreneurial independent contractor status. Wardle was paid on a different basis than employees who were not owner-operators.[11] His compensation, which was paid in

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(footnote continued)

applicant's benefits absent evidence of bad faith.

We also include in our review facts contained in the parties' stipulations before the district court.

Wardle argues that there is no evidence in the record showing that the Committee actually considered all the information it had available. However, Central States' answer to supplemental interrogatory 23, which includes copies of all factual documents then available to the Committee, states that the Committee's decision was made on the basis of the documents.

[11] In distinguishing between employees and independent contractors, Illinois courts have considered the fact that the person under consideration is treated differently than employees with respect to benefits. *Munts* v. *Fitzsimmons*, 25 Ill. 3d 109, 112, 323 N.E.2d 153, 155 (1975).

Wardle also argues at points that it is impermissible to consider the mode of payment under Illinois law. Illinois courts clearly have considered it. *See* 17 Ill. Law & Prac., *Employment* § 4, at 373 (1956).

one check for both services and equipment, was calculated not by the hour or week but by mileage. He was fully responsible for the maintenance of his truck, including license and maintenance insurance. Purcell provided no assistance in financing Wardle's purchase of his truck, which bore the name "Claude Wardle Trucking," or in paying for fuel, tires, and repairs. Thus Wardle made all those decisions on his own. Wardle never bound himself by lease to work exclusively for Purcell and was subject to no restrictions on the personal use of his truck or his solicitation of business elsewhere. Wardle was also not on the same seniority list, which presumably affected jobs to be taken, as employees who were not owner-operators. Purcell did not withhold any federal income tax or Social Security tax from Wardle's check, and Wardle represented himself as self-employed for all tax purposes.

We concude further that Central States' decision that Wardle was self-employed while working for Lovelace was not erroneous as a matter of law. The Lovelace relationship again falls between pure employee and pure independent contractor status. Wardle highlights the following aspects of his employment at Lovelace: Like Purcell, Lovelace had authority to hire, fire, and discipline him. Lovelace also decided when Wardle reported to work, the hours he worked, and the routes he worked. Wardle could refuse a trip only because of illness. Lovelace paid hospitalization insurance for Wardle. Wardle's lease placed his truck in "the exclusive possession, control, and use" of Lovelace. His tractor bore a sign indicating that it had been leased to Lovelace. During virtually all of the contested period, Wardle serviced one customer, whose business he had not solicited, on one route. Wardle also did not have his own operating authority from the Interstate Commerce Commission, but drove under Lovelace's.

Yet because aspects of Wardle's relationship with Lovelace resembling an independent contractor status are numerous also, Central States' determination that Wardle was not an employee of Lovelace was again not erroneous as a matter of law or arbitrary or capricious. Wardle purchased his tractor without any assistance from Lovelace, and was alone responsible for the upkeep of the tractor. Under the lease, Wardle was to save Lovelace harmless from all shippers' claims for loss or damage.[12] Wardle was paid on the basis not of time worked but of mileage and revenue. While the applicable collective bargaining agreement required that owner-operator employees be paid in separate checks for equipment rental and driving services, Wardle received a single check for both.[13] Lovelace did not withhold federal income tax or Social Security taxes from Wardle's check and did not pay any Social Security taxes on Wardle's behalf. Wardle made workers' compensation and unemployment contributions

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[12] Wardle's deposition, which was not before the trustees and was not stipulated to in the district court, indicates that Lovelace paid for all insurance except when Wardle was "bobtailing," *i.e.*, driving his tractor without a Lovelace trailer.

[13] Wardle argues that the noncompliance of his Lovelace working arrangement with the collective bargaining agreement provisions for owner-operator employees cannot be considered against him because his arrangement was void and void contracts cannot be used against a party unless the claim is based directly thereon. *See* 17 Am. Jur. 2d, *Contracts* § 219 (1964). Wardle incorrectly believes Central States to be arguing for nonenforcement of the Pension Plan, which is considered a part of the collective bargaining agreement, because the Plan grew out of or is immediately connected with the allegedly void arrangement. *See* id. § 218. Instead, Central States is arguing that failure to follow collective bargaining agreement provisions for establishing employee status for owner-operators is one factor relevant to deciding whether Wardle had employee status.

himself. His status for federal income tax and Social Security purposes was "self-employed." To the same effect is the fact that although pension contributions were made to Central States, a sworn statement of Lovelace's payroll clerk indicated that Wardle paid these contributions through a deduction in his check.[14] Although under the same union contract, Lovelace's employees who were not owner-operators were not paid in the same manner as Wardle, and were, for all but the last of Wardle's years as an owner-operator, not on the same seniority list.

Therefore, Central States' determinations that Wardle was not an employee of Purcell and Lovelace were not arbitrary or capricious or erroneous as a matter of law. Although we might as an original trier of fact have decided that Wardle was an employee of both companies, we cannot overturn the decision of the Plan's trustees.[15]

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[14] The original questionnaire filed by Lovelace and a letter from the company's president received after the payroll clerk's statement both indicated that Lovelace made the pension contributions, but the Committee was free to conclude otherwise.

We note that Central States has never purported to base its denial of Wardle's application directly on a contention that these contributions were contrary to the terms of the Plan. Central States has also offered to refund to Wardle all pension contributions made on his behalf if consistent with this court's holding in *Martin* v. *Hamil & Butler*, 608 F.2d 725 (7th Cir. 1979).

[15] Wardle cites a number of cases that he contends require a conclusion of an employee status on these facts. We consider the most significant ones.

Reiherzer v. *Shannon*, 581 F.2d 1266 (7th Cir. 1978), is distinguishable. In holding that Central States arbitrarily excluded an employee who was also the company's president and chief executive officer, the court stressed (1) that the Plan did not expressly exclude the time an employee is also a corporate officer from creditable service toward the continuous service in the industry requirement, (2) that the decision was inherently inconsistent because it

(footnote continued)

We also cannot say that, in light of all these facts, the trustees' conclusions were not supported by substantial

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(footnote continued)

treated as a change in the applicant's employee status the corporation's decision to file federal income tax as a Subchapter S corporation and (3) that the trustees made no showing that corporate employees are generally not credited with service in the industry. By contrast in this case, although the Plan does not specifically exclude credit for owner-operators, it does expressly exclude credit for self-employed individuals and thus owner-operators who are considered self-employed. Wardle's disposal of his tractor to use Lovelace trucks was a clear change in an element relevant to his employment status, so the decision was not inherently inconsistent. And as indicated by the questionnaire in the other files in the record of owner-operators denied benefits, Central States investigates the employment status of owner-operators and denies benefits to some because of the details of their employment arrangements.

In *Hayes* v. *Morse,* 474 F.2d 1265 (8th Cir. 1973), *aff'g* 347 F. Supp. 1081 (E.D. Mo. 1972), where owner-operators were found to be employees as a matter of law, they could not, by the terms of their contract work for anyone else, the employer, was to approve all substitute drivers, and the employer's name was on the truck. In addition, the employer financed the truck purchases of the owner-operators and held title until the loans were completely paid.

To the extent that the employment relationships in *Joint Council of Teamsters 42* v. *N.L.R.B.,* 450 F.2d 1322 (D.C. Cir. 1971) (2-1 decision), resemble those here, we note that the panel majority decided that the Board's determination of employee status should stand because it was one of "two fairly conflicting views," not that the owner-operators were employees as a matter of law. We also note that the owner-operators in that case were paid by the hour and had no control over their rate of pay.

In *Van Watermeullen* v. *Industrial Comm'n,* 343 Ill. 73, 174 N.E. 846 (1931), a worker's compensation case, the owner-operator had no control over the amount of pay he received and other employees of the employer had complete control of the loading and unloading of the truck. To the extent that that court seems to stress inordinately the right of control or supervision, we must respectfully disagree.

evidence. That various aspects of Wardle's employment seem inconsistent with others does not indicate a need for further factual research to resolve the conflicts; it merely indicates that his employment was of a hybrid variety.[16]

Another argument Wardle makes is that Central States' process of decision with respect to owner-operators was arbitrary and capricious because there is no evidence of the pension fund's consistent treatment of owner-operators. *See Reiherzer* v. *Shannon,* 581 F.2d 1266, 1273-74 (7th Cir. 1978). We must disagree. As noted above, in response to Social Security records indicating no employment, Central States sent questionnaires to the two employers and Wardle asking about the details of the employment relationships. The same or virtually identical questionnaires are found in many of the files in the record of other owner-operators denied pension benefits. Thus there is evidence of a consistency of treatment of owner-operators.[17]

With respect to the additional evidence on the merits presented for the first time to the district court, it is generally inappropriate for a court to make the initial

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[16] Wardle also argues that his federal income tax and Social Security status of "self-employed" is insufficient to support Central States' decision. That decision, however, was not based solely on Wardle's tax status.

[17] Although Wardle does not raise this issue, we note with concern the skeletal nature of the letters explaining the Committee's reasons for its decision. Although they informed Wardle that his application had been denied because he was self-employed while working for Purcell and Lovelace, the letters arguably did not set forth the reasoning behind the decision of the type of information necesary for him to qualify for a pension. *See* 29 U.S.C. § 1133; 29 C.F.R. §2560.503-1(f).

consideration of whether such facts establish an applicant's eligibility for retirement benefits. *See* text at note 7 *supra*. In this case, however, the additional facts presented by Wardle to the district court strengthen his arguments only minimally. Remand to the trustees for consideration of these facts would be a "useless formality." *Ruth* v. *Lewis*, 166 F.Supp. 346, 349 (D.D.C. 1958).

We therefore affirm the district court's decision upholding Central States' denial of Wardle's application for retirement benefits.

II.

Because we have decided that the question of whether Wardle was an employee while working for Purcell and Lovelace was an issue of fact and not one of law, we must consider Wardle's argument that he was entitled to a jury in the district court. Wardle argues principally that ERISA grants him the right to a jury as a statutory matter. We agree with the district court, however, and conclude that Wardle was not entitled to a jury in this action.

Wardle bases his argument that ERISA provides him with a jury right on *Stamps* v. *Michigan Teamsters Joint Council 43*, 431 F. Supp. 745 (E.D. Mich. 1977). The court in *Stamps* reasoned primarily that, even though ERISA does not specifically address the jury right issue, the statutory scheme itself and its legislative history compel the conclusion that § 502(a)(1)(B) provides a plaintiff suing for pension benefits due and owing with a right to a jury. Because the Constitution entitles a party to a jury for all legal claims, the statutory issue to the *Stamps* court was whether Congress, in § 502(a)(1)(B), had created a legal or equitable claim. The subsection itself is silent on that issue, but, according to that court, if claims under § 502(a)(1)(B) were construed as equita-

ble, that subsection would become mere surplusage in light of § 502(a)(3), which expressly provides participants and beneficiaries with a right to bring civil actions for various kinds of equitable relief. The court thus concluded that, to avoid becoming superfluous, § 502(a)(1)(B) must be construed as creating a legal right, which entitled Stamps to a jury. The court found further support for its conclusion in the Joint Explanatory Statement of the Committee of Conference, which reads in part:

> All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.

H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 5038, 5107. The court construed this statement to indicate, in light of its independent conclusion that Stamps was entitled to a jury under § 301 of the Labor-Management Relations Act on the part of his claim for pre-ERISA benefits, that a jury should also be provided for claims under § 502(a)(1)(B) of ERISA.[18]

We must respectfully disagree with the reasoning of the *Stamps* court. Even if it is assumed that *all* claims brought under § 502(a)(1)(B) are equitable in nature, that subsection would not be superfluous. The specific types of claims enumerated in § 502(a)(1)(B) would still have to be separated in some manner from general equitable actions under § 502(a)(3) because Congress granted state courts concurrent jurisdiction only over § 502(a)(1)-(B) claims. 29 U.S.C. § 1132(e)(1). Thus the statutory

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[18] The analysis of the *Stamps* court has been approved in *Pollock* v. *Castrovinci*, 476 F. Supp. 606, 608-09 (S.D. N.Y. 1979).

scheme does not imply that § 502(a)(1)(B) claims are legal. The court's reliance on the legislative history is also flawed. The quoted statement merely indicates Congress' intent that federal courts should create federal common law in civil actions under § 502(a)(1)(B) of ERISA, just as the Supreme Court in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957), ruled that the courts could establish federal common law for claims "arising under" § 301 of the Labor-Management Relations Act. *See Reiherzer* v. *Shannon,* 581 F.2d 1266, 1271 (7th Cir. 1978). The Committee states that § 502(a)(1)(B) claims are to be regarded "in similar fashion" to § 301 actions, not that the identical rules of federal common law are necessarily to apply in both statutory claims.

We conclude that Congress' silence on the jury right issue reflects an intention that suits for pension benefits by disappointed applicants are equitable. Such suits under the law of trusts have existed for quite a while in state courts and have been entertained in federal courts under their diversity jurisdiction. These suits have been considered equitable in character. *See Davis* v. *Huge,* 91 L.R.R.M. 2234 (E.D. Ky. 1975); *Genesta* v. *San Diego County Laborers' Pension Plan,* 87 Lab. Cas. ¶ 11702, at 22827 (S.D. Cal. 1979); *Porter* v. *Central States Pension Fund,* 98 L.R.R.M. 3210 (N.D. Iowa 1978); *Sichko* v. *Lewis,* 191 F. Supp. 68 (W. D. Pa. 1960). This conclusion has been based primarily on the law of trusts, which provides a beneficiary with a legal remedy only with respect to money the trustee is under a duty to pay unconditionally and immediately to the beneficiary. *Restatement (Second) of Trusts* §§ 197-198 (1959).[19] Thus

[19] We do not think that if Wardle had a right to benefits, he would be entitled to immediate and unconditional payment of all the benefits he would receive if he lived no shorter and no longer than his life expectancy.

the most reasonable interpretation is that Congress intended to provide general federal jurisdiction over these equitable suits that had traditionally been brought in state courts.

This interpretation of the statute finds support in many other considerations. First, although Congress gave federal courts exclusive jurisdiction over claims created under § 502 for violations of various provisions of ERISA, suits under § 502(a)(1)(B) remain within the jurisdiction of state courts. 29 U.S.C. § 1132(e)(1). In addition, as noted above, federal courts have interpreted the scope of their review in actions under § 502(a)(1)(B) to be identical to the limited review employed in earlier federal diversity actions. *See* text at note 6 *supra.* Although Wardle argues that the arbitrary and capricious standard is analagous to such questions as assumption of risk, which have been decided by juries, application of the arbitrary and capricious standard has traditionally been done by judges. In addition to indicating the traditional nature of Wardle's cause of action, the limited scope of review bespeaks a legislative scheme granting initial discretionary decisionmaking to bodies other than the federal courts, with which federal jury trials have proved incompatable. *See Curtis* v. *Loether,* 415 U.S. 189, 194-95 (1974). This incompatibility is further evidence of the unlikelihood of any implied congressional intent to grant a jury right in these cases.[20] We therefore conclude that ERISA does not

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[20] Wardle also relies heavily on *Lorillard* v. *Pons,* 434 U.S. 575 (1978), which held that statutory language in the Age Discrimination in Employment Act of 1967 empowering a court to grant "legal or equitable relief" evidenced Congress' intent to grant the right to a jury decision of issues relevant to the winning of legal relief even though the statute did not include a specific grant of a jury

(footnote continued)

grant Wardle a right to a jury trial.[21]

For all the foregoing reasons, the decision of the district court is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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(footnote continued)

right. As explained in our discussion of the *Stamps* decision, we do not think that §§ 502(a)(1)(B) and 502(a)(3) are to be read as establishing a clear and rigid dichotomy between legal and equitable claims, and we find this claim to be equitable in nature.

[21] Wardle also argues that he is entitled to a jury under the Seventh Amendment as recently interpreted in *Curtis* v. *Loether*, 415 U.S. 189 (1974). In light of our conclusion above that this claim is equitable, no further discussion is necessary to reject Wardle's constitutional argument.

IN THE UNITED STATES DISTRICT COURT

* * (Caption—TH 77-149-C) * *

ORDER

This cause comes before the Court upon the plaintiff's motion to amend his complaint by interlineation in order to increase his demand for punitive damages and the defendant's motion to strike the plaintiff's demand for a jury trial.

The Court, having considered the motions and the briefs filed in support thereof and in opposition thereto, and now being duly advised in the premises, hereby DENIES the plaintiff's motion and GRANTS the defendant's motion.

IT IS SO ORDERED.

DATED this 23rd day of April, 1979.

/s/ *James E. Noland*

James E. Noland, U. S. District Judge

MEMORANDUM ENTRY

This cause seeks benefits under the defendant's pension plan pursuant to 29 U.S.C. §1132, the Employee Retirement Income Security Act of 1971 (ERISA). The complaint includes a claim for punitive damages and the plaintiff now seeks to increase that demand to $1,000,000. Because such damages are not recoverable under ERISA the Court must deny this plaintiff's motion. Further, that Act does not authorize trials by jury and thus the defendant's motion must be granted.

PUNITIVE DAMAGES

The plaintiff relies upon language in *Rieherzer* v. *Shannon,* 581 F.2d 1266 (7th Cir. 1978), which analogizes ERISA to the Labor-Management Relations Act of 1947

(LMRA), to support his claim for punitive damages. There are two flaws in this reliance. First, the language in *Reiherzer* involves a question of jurisdiction. The quote there from the legislative history of ERISA clearly applies only to the authority of a federal court to rule on claims brought under that Act. Thus the LMRA does not control the question of punitive damages in ERISA cases.

Second, even if the LMRA was controlling, the Court is unconvinced that punitive damages are available under that statute. The plaintiff relies upon District Court opinions which fail to clearly address this question while omitting those Court of Appeals decisions which have clearly rejected his contention. *Local 127, United Shoe Workers* v. *Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962); *Williams* v. *Pacific Maritime Association*, 421 F.2d 1287 (9th Cir. 1970). Thus the plaintiff's analogy to the LMRA is unconvincing.

Turning to ERISA itself this Court believes the opinion in *Bell* v. *Southern Oregon Log Scaling & Grading Bureau*, Docket No. 76-431 (Ore. August 3, 1976) cited by the defendant more correctly states the law controlling this case. This Court has previously ruled that punitive damages are not recoverable under Title VII and its language is similar to that in ERISA. For this reason the Court must deny the plaintiff's motion.

JURY TRIAL

The plaintiff supports his claim for a jury trial by citing the following general language in *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974):

> (W)hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is *obviously no functional justification for denying the jury trial right*, a jury trial

> must be available if the action involves rights and remedies of the sort typically enforced in an action at law. (Emphasis added)

The emphasized language presents the key issue here since the plaintiff, in order to recover, must show more than a contractual right by a preponderance of the evidence but rather must show by such evidence that the trustees have acted arbitrarily and capriciously. As stated by the Seventh Circuit Court of Appeals in *Rieherzer*:

> This court, in deciding this case, under federal common law principles, of course, cannot replace its judgment for the considered judgment of the Plan's trustees. 581 F.2d at 1272.

This Court believes that standard must be applied by any jury which may sit in this case and questions whether that is a "functional justification" for disallowing a jury trial.

The only reported opinion addressing this issue is *Stamps* v. *Michigan Teamsters Joint Council No. 43,* 431 F. Supp. 745 (E.D. Mich. 1977), which upheld the right to jury trial via statutory construction. It found specific provision in ERISA for both actions at law and at equity and determined that the case before it arose under the former section. This determination was unexplained by the Court and has left the question of one's right to a jury trial under ERISA to depend upon a determination of the nature of the cause itself. The defendant has directed the Court's attention to unrecorded opinions which have found suits under ERISA to be equitable in nature. Again those cases simply reach that conclusion without explanation.

This Court believes this suit, though other actions under ERISA may be treated differently, is equitable in nature because of the "arbitrary and capricious" standard which must be applied. The question is not whether the plaintiff has a contractual (sic) right to receive benefits from the defendant but rather whether it has acted improperly in making the determination that he was not so entitled. For that reason the defendant's motion must be granted.

Opinion by Judge Swygert
JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 14, 1980.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge

CLAUDE WARDLE, SR.,

Plaintiff-Appellant,

No. 79-2295 vs.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Terre Haute Division
No. TH 77C-149
Judge James E. Noland

This cause was heard on the record from the United States District Court for the Southern District of Indiana, Terre Haute Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CLAUDE WARDLE, SR.	)	
	)	
vs.	)	NO. TH 77-149-C
	)	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	)	

ENTRY OF JUDGMENT

This cause came before the Court for trial without a jury on May 22, 1979, during which stipulations were entered, evidence was presented, and oral arguments were heard.

The Court, having examined the evidence, and now being duly advised in the premises, hereby finds in favor of the defendant, Central States, Southeast and Southwest Areas Pension Fund, and against the plaintiff Claude Wardle, Sr. In accordance with its Memorandum of Decision, the Court now ENTERS JUDGMENT for the defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff take nothing by way of his complaint herein and that costs be borne accordingly.

DATED this 27th day of September, 1979.

/s/ *James E. Noland*

James E. Noland, U.S. District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

CLAUDE WARDLE, SR.	)	
	)	
vs.	)	NO. TH 77-149-C
	)	
CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND	)	

MEMORANDUM OF DECISION

Plaintiff seeks review of the decision of the trustees of defendant that denied his request for pension benefits. Defendant asserts that plaintiff has failed to provide twenty (20) years of continuous service to the trucking industry due to plaintiff's self-employed status during the years 1961 to 1972. The provisions of the defendant plan that control eligibility for benefits from the defendant fund states in bold-faced type, in part, "Any service in the industry as an employer, as a member of a partnership or self-employed shall not be included as creditable service for purposes of the Pension Plan." Art. I, Sec. 14A, p. 34. This provision reflects the Taft-Hartley Act's limitations on eligibility for pension programs to "employees and their dependants," 29 U.S.C. §186(c)(5), and the exclusion of independent contractors from the definition of an "employee." Id. §152.(3). Plaintiff's alleged failure to meet the above requirement is the only reason he did not receive the pension benefits he seeks herein.

The defendant's trustees' determined on the basis of the evidence plaintiff offered to them that Claude Wardle, Sr. was not an employee in the teamster industry for the twenty continuous years required to receive pension benefits. It is well established that judicial review of a pension plan's administration is limited to a determination of whether the trustees' decision was the product of fraud, arbitrary action, or a breach of fiduciary trust. Given the facts before them, plaintiff's social security records, plaintiff's lease agreements and other documents, and the requirements of the governing statutes and Trust Agreement, the defendant's trustees' action in this case was exactly the type of "patently reasonable" determination which must be sustained. *E.g., Gaydosh* v. *Lenus,* 410 F. 2d 262, 265 (D.C. Cir. 1969); *Miniard* v. *Lenus,* 387 F.2d 864 (D.C. Cir. 1967).

Plaintiff seeks to void the trustees' determination as to his eligibility for pension benefits by suggesting that the trustees' consideration of his social security records was improper. While total reliance upon such records may be inappropriate, this Court believes such records are certainly a legitimate and proper area of consideration and can satisfy the "substantial evidence test" for judicial review of trustee action if there is no evidence to refute their implication that there were periods when a claimant was not in an employee status. It is clear that defendant's trustees did not rely solely on a plaintiff's social security records in reaching their decision. When alerted to a potential problem, indicated by plaintiff's lack of wage reports with the Social Security Administration, the trustees then solicited questionnaires and other information to review in greater detail plaintiff's arrangements with his prior employers. Ultimately, the trustees' determination that plaintiff was not in an employee status for the requisite period was supported by the methods of compensation,

plaintiff's lack of seniority in his employee unit, plaintiff's self-employed status for all tax purposes, the use of a single transaction for both driver and equipment rental fees, and plaintiff's self-payment of fringe benefit premiums. In the end, defendant's trustees clearly made a conscientious determination based upon all available facts and satisfied the requirements of reasonableness and good faith necessary for this Court to sustain their determination.

For the reasons set forth above, this Court must find that the determination of the defendant by and through its trustees that plaintiff was not entitled to the pension benefits he claims herein was not a product of fraud, arbitrary action, or a breach of a fiduciary trust. The Court thereby finds for the defendant and against the plaintiff. The foregoing shall constitute the findings of fact and conclusions of law of this Court pursuant to Rule 52 of the Federal Rules of Civil Procedure.

DATED this 27th day of September, 1979.

/s/ *James E. Noland*
James E. Noland, U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE

No. CIV-2-78-189

EARL G. BOUTON,

Plaintiff,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendant.

ORDER

This matter was referred to the undersigned United States Magistrate, pursuant to 28 U. S. C. § 636 (b) and the Rules of this Court, for the disposition of plaintiff's motion to amend his complaint and defendant's motion to strike plaintiff's jury demand. Rules 15 (a) and 39 (a) (2), Federal Rules of Civil Procedure.

Plaintiff originally filed this civil action to recover pension benefits from the defendant in a law court of the State of Tennessee. The defendant thereafter removed this action to the District Court asserting federal jurisdiction (1) based on diversity of citizenship (28 U. S. C. § 1332) and (2) by virtue of the jurisdictional provisions of section

502 of the Employee Retirement Income Security Act (ERISA) of 1974 (29 U. S. C. § 1132).[1]

I. MOTION TO AMEND COMPLAINT

Plaintiff has moved to amend his original complaint in order to plead a claim under section 502 (a) (1) (B) of ERISA (19 U. S. C. § 1132 (a) (1) (B)) based upon the same facts and circumstances as his original claim. In addition, by his amendment, plaintiff seeks attorney's fees and costs under 29 U. S. C. § 1132 (g).

It is ORDERED that plaintiff's motion to amend his complaint be GRANTED. *See Foman* v. *Davis* (1962), 371 U. S. 178, 182, 83 S. Ct. 227, 9 L. Ed. (2d) 222, 226 (headnotes 5, 6, 7).

II. MOTION TO STRIKE JURY DEMAND

The defendant has moved to strike plaintiff's jury demand. Rule 39 (a) (2), Federal Rules of Civil Procedure.

> * * * The Seventh Amendment preserves to litigants the right to jury trial in suits at common law "not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights

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[1] 29 U. S. C. § 1132 (e) (1) provides, in relevant part, that

> Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by a * * * beneficiary * * *. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a) (1) (B) of this section.

alone were recognized, and equitable remedies were administered. * * *'' Parsons v. Bedford, Breedlove & Robeson, 3 Pet. 433, 446, 7 L. Ed. 732 (1932).

Nedd v. *Thomas,* D. C. Pa. (1970), 316 F. Supp. 74, 76 [1].

In *Stamps* v. *Michigan Teamsters Joint Council No. 43,* D. C. Mich. (1977), 431 F. Supp. 745, the court held that a plaintiff's action for benefits against a pension fund arising under Section 301 of the Labor-Management Relations Act, 29 U. S. C. § 185, and Section 502 of ERISA, 29 U. S. C. § 1132, was legal in nature and therefore triable to a jury upon demand. 431 F. Supp. at 746 [1]. With respect to the plaintiff's claim for benefits under ERISA, the court reasoned that, although ERISA does not specifically address the right to a jury trial, Section 502 of the Act distinguished between equitable and legal causes of action. Section 502 provides, in relevant part, that

(a) A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

29 U. S. C. § 1132 (a).

The *Stamps* court decided that subsection (a) (3) "clearly and specifically creates a civil action for equitable relief * * *", whereas subsection (a) (1) (B) creates "* * * a *different* civil action for legal relief. * * *" *Id.* at 747 (emphasis added).

> This follows the general rule of statutory construction that statutes should be construed in such a way as to render none of the subsections superfluous. If the court construed subsection (a) (1) (B) to also create a cause of action for equitable relief, it would be superfluous to subsection (a) (3).
>
> *Id.*[2]

The defendant cites several cases denying jury trials to plaintiffs seeking to recover pension benefits under their unions' pension plans. In *Davis* v. *Huge*, D. C. Ky. (1975), 91 LRRM 2234, the court concluded that the issue of the plaintiff's entitlement to benefits was an essentially "equitable" issue and triable to the court, but that the "* * * contingent * * *" issue of damages was an inherently "legal" issue, to which the right of trial by

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[2] The *Stamps* court also found justification for its holding in the legislative history of ERISA. The Joint Explanatory Statement of the Committee of Conference, in discussing civil actions by employee pension plan beneficiaries under section 502, reads, in relevant part:

> All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947. [29 U. S. C. § 185].

H. R. Conf. Rep. No. 93-1280, 93rd Cong., 2d Sess. *in* 1974 U. S. Code Cong. & Ad. News pp. 5038, 5107. An employee who sues for money damages arising from a breach of a collective bargaining agreement under section 301 of the Labor-Management Relations Act is entitled to a jury trial upon request. 431 F. Supp. at 746 [3]; *see Allen* v. *United Mine Workers of America*, C. A. 6th (1963), 319 F. (2d) 594.

jury would attach.[3] In *Porter* v. *The Central States, Southeast and Southwest Areas Pension Fund,* D. C. Iowa (filed June 26, 1978), No. C 77-3041, *motion for reconsideration denied* (filed July 25, 1978),[4] the court denied a jury trial to a plaintiff seeking a declaratory judgment of entitlement to benefits under a specific pension plan.

Although all three of these cases involve actions by a beneficiary against a pension plan trust fund, the *Stamps* decision is distinguishable from both *Davis* and *Porter, supra.* In *Stamps,* (and in the case *sub judice*), the plaintiff asserted claims under Section 502 of ERISA, thus seeking *legal* relief, and not basing his claim solely upon an equitable cause of action.[5] *Davis* "* * * was decided without reference to either Section 301 of the Labor-Management Relations Act or ERISA * * *". *Stamps, supra,* 431 F. Supp. at 746. Jurisdiction in that case was grounded solely upon diversity of citizenship under 28 U. S. C. § 1332. *Davis, supra,* 91 LRRM 2235. *Porter* was *expressly* decided without reference to the Labor-Management Relations Act or ERISA; that court

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[3] There is no issue of damages in this case, as defendant admits the amount due plaintiff if liability is established. Brief in Support of Defendant's Motion to Strike Plaintiff's Demand for a Jury Trial, pp. 3-4. The court in *Stamps* did not rely upon the liability issue—damages issue distinction drawn in *Davis,* but based its decision instead upon its interpretation of section 502 ERISA and Section 301 of the Labor-Management Relations Act of 1947.

[4] A copy of the *Porter* decision is attached to defendant's brief in support of his motion to strike plaintiff's jury demand.

[5] Plaintiff instituted this action in the Sullivan County, Tennessee, Law Court by filing a breach of contract action, seeking back benefits including interest, plus his future benefits. An action for the payment of pension fund benefits has been traditionally considered equitable. *Sichko* v. *Lewis,* D. C. Pa. (1960), 191 F. Supp. 74; *Davis* v. *Hugh,* D. C. Ky. (1975), 91 LRRM 2234. *See* Restatement (Second) of Trusts § 197.

distinguisred *Stamps* from the case before it by relying upon the statutory vs. common law distinction drawn by the *Stamps* court. *Porter, supra,* On Petition to Reconsider, slip op. at 1, 2.

> * * * When Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts,[6] where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.
>
> *Curtis* v. *Loether,* (1974), 415 U. S. 193, 196, 94 S. Ct. 1005, 1009, 39 L. Ed. (2d) 260 (headnote 5).

Plaintiff's legal claim for benefits past due is joined by his request that the Court "* * * clarify future benefits * * *" due him. Amended Complaint ¶ 9. Declaratory judgment proceedings, when sought in an action such as the present one, are equitable in nature. *Davis* v. *Huge, supra,* 91 LRRM at 2236. The combination of both legal and equitable claims, however, cannot defeat plaintiff's right to jury trial on the legal claim, including all issues common to both claims. *Beacon Theatres, Inc.* v. *Westover,* (1959), 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. (2d) 988.

Based on the foregoing, it is ORDERED that defendant's motion to strike plaintiff's jury demand be DENIED.

ENTER:

/s/ *Robert P. Murrian*
Robert P. Murrian
UNITED STATES MAGISTRATE

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[6] A civil action to recover benefits under an employees pension plan under 29 U. S. C. § 1132 appears to give rise to a *de novo* determination of eligibility and damages. *Cf. Carter* v. *Montgomery Ward & Co.,* D. C. Tenn. (1976), 76 F. R. D. 565 (*de novo* hearing for claim against employees disability plan brought under 29 U. S. C. § 1132 (a, e)).